No. 79121-0

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ROY L. NEFF

Petitioner.

PETITIONER'S SUPPLEMENTAL BRIEF

On review from the Court of Appeals, Division Two,
and the Superior Court of Pierce County

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2. The agreement was not a true agreement to proceed on stipulated facts because it involved an admission of guilt and a waiver of appeal, neither of which are consistent with stipulated facts trials.

3. Counsel was constitutionally ineffective.

B. SUPPLEMENTAL STATEMENT OF THE CASE

1. Procedural Facts

Petitioner Roy Neff was charged by amended information with multiple counts and enhancements relating to methamphetamine and marijuana manufacture. CP 34-37.

After a hearing on November 20 and 24, 2003, the Honorable Ronald Culpepper denied Neff's motion to suppress the evidence. 7RP 213-14. Juror selection for trial had begun when the parties agreed to a "stipulated facts" bench trial on an amended information, which charged only one count of methamphetamine manufacturing and a firearm

enhancement.[1] 7RP 213-14, 220, 8RP 120; CP 99-104. After accepting the "stipulated facts" agreement, the judge found Neff guilty. 7RP 236-37. At sentencing, the judge added 36 months of "flat time" for the firearm enhancement. SRP 12; CP 118-129.

Mr. Neff appealed and, on July 5, 2006, Division Two affirmed in an unpublished opinion. State v. Neff, 2006 Wash. App. LEXIS 1429.

[1] References to the verbatim report of proceedings are explained in Appendix A.

2. Overview of facts regarding offenses[2]

After an officer on his property noticed a garden sprayer with a "mist" coming off it and several "blister packs" in a "burn pile," Roy Neff was placed in a police car while deputies used his keys to open an unlocked garage in order to search it. 7RP 98-101. In a concealed room off the garage, officers found a "marijuana grow operation." 7RP 106. In the garage was found, inter alia, suspected drugs, smoking devices, stripped lithium batteries, and numerous other items indicating various stages of manufacture of methamphetamine. 7RP 106. The anhydrous ammonia smell which led the officer to the property in the first place was coming from a plastic pitcher hidden inside an unlit wood stove. 7RP 106.

After the entry into the garage, the officers sought a warrant.[3] See CP 345. In the later search pursuant to that warrant further evidence, including several guns, was found. See CP 345.

3. Overview of facts regarding waiver of jury trial

In addition to the facts set forth in his briefing in the court of appeals and his Petition for Review, Mr. Neff submits the following

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[2]More lengthy discussion of the facts is contained in Appellant's Opening Brief at 5-15. The facts relevant to the issues on review are discussed in more detail, *infra.*

[3]The court of appeals decision upholding the denial of the motion to suppress is not at issue in this Petition.

additional, relevant facts regarding the agreement for the "stipulated bench trial." See Brief of Appellant ("BOA") at 12-13; Petition at 6-9.

In discussing the agreement, the court asked if Neff understood that he could be found guilty and there was a "good chance" of that happening. 7RP 212-15. Neff said he understood. 7RP 212-15.

The parties then discussed a date for sentencing and the need for Neff to get a "rider" on his bail, even though the prosecutor had not yet given the court any of the evidence upon which the stipulated facts trial was to be decided. 7RP 216. When the second amended information was read, counsel said,

> Mr. Neff, formally, I suppose, enters a plea of not guilty, however he has also completed the stipulation to the police reports, et cetera . . .and is prepared to allow the Court to make a guilty or not guilty determination based upon the Court's review of those records.

7RP 220.

Although Neff said he had reviewed the agreement with his attorney, his understanding of the effect of the agreement was "That I'm making a plea deal with the prosecutor." 7RP 220. He could not explain what the agreement meant in relation to the jury. 7RP 220-21. After conferring with his client, counsel told the court he had gone over "all these items, the constitutional rights" with Neff and they had discussed the case and possible defenses, as well as "the prosecutor's recommendation

and the stipulation." 7RP 221. Mr. Neff had "appeared to be reading along" but counsel admitted that "sometimes these things can be complicated," so he might have to explain if Neff could not "accurately answer" the judge's questions. 7RP 221.

At that point, the court told Neff the document had "a whole lot of effects," including that the trial would consist of the court reading the items submitted but no other evidence would be presented. 7RP 221-22. The court also said, if there was "sufficient evidence in the reading of the police reports," Neff could be found guilty, and that the court would be determining that and whether there was "enough evidence to support the firearm enhancement." 7RP 221-23. Neff said he understood. 7RP 223.

The court then read part of the stipulation which said "I stipulate there is sufficient evidence to support the charged offense and the firearm enhancement as charged[.]" 7RP 223. The court said Neff had the right to appointed counsel and a jury trial, and that the stipulated facts trial would involve no cross-examination, no presentation of defense evidence, and no chance for "live" confrontation. 7RP 223. The court also said the agreement was "reserving the right to challenge sufficiency of evidence to support the conviction while reserving the right to challenge the suppression hearing findings and conclusions," so that Neff could "still appeal." 7RP 224. Counsel asked for clarification and the court then

corrected itself and said the agreement included a waiver of "the right to challenge the sufficiency of evidence to support the conviction on appeal" but not to appeal the suppression decision. 7RP 224-25.

After some discussion of the possible sentence, the court told Neff he could go to trial if he wanted. 7RP 227-28. Mr. Neff said he understood it was his decision and he had gone over the entire agreement with counsel. 7RP 228-29. Counsel said he had no doubt the agreement was "freely and voluntarily made." 7RP 229.

Mr. Neff was never asked if he understood that he was giving up his due process rights to be free from conviction upon less than sufficient evidence by giving up his right to appeal the insufficiency of the evidence. 7RP 224-29. The section of the Stipulation which explained Neff's understanding of the constitutional rights he was giving up explained the relevant rights as the trial by jury, to remain silent, to refuse to testify, and to cross-examine, confront, and present witnesses, but did not mention due process or waiving the right to be free from punishment or conviction upon less than constitutionally sufficient evidence. CP 99-101.

4. Facts relating to sufficiency of the evidence

In addition to the facts set forth in his pleadings below and in the Petition, Mr. Neff submits the following facts relevant to this issue. See BOA at 14-15. In the garage, under a desk, the officers searching

pursuant to the warrant found a safe, which contained many items including a Smith & Wesson .357 handgun loaded with 5 rounds and a Colt .45 caliber gun, which was apparently unloaded, as it was reported there was "one magazine found with five cartridges." CP 214-23. In the rafters of the garage, police found a tool belt containing a holster, which held a Davis .380, with a magazine in it but no cartridge chambered. CP 214-15. There was no evidence presented about whether that pouch could have been easily reached or reached at all without a ladder from any part of the floor of the garage. CP 158-320. An Ithaca shotgun was also found behind the headboard in the master bedroom. CP 219-33.

The second amended information charged Mr. Neff or an accomplice with being armed with a firearm "to-wit: Davis Model P380 and/or Colt .45." CP 105.

C. SUPPLEMENTAL ARGUMENT

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE FIREARM ENHANCEMENT, THE AGREEMENT DID NOT VALIDLY WAIVE PETITIONER'S DUE PROCESS RIGHTS TO BE FREE FROM PUNISHMENT UNLESS THE STATE PROVED ITS CASE WITH SUFFICIENT EVIDENCE, AND COUNSEL WAS INEFFECTIVE

1. The evidence on the enhancement was insufficient

The threshold issue in this case is whether there was sufficient evidence to support the firearm enhancement. In reviewing that issue, this Court determines whether, viewed in the light most favorable to the state, a rational trier of fact could have found the facts supporting it, beyond a reasonable doubt. See State v. Myers, 133 Wn.2d 26, 37, 941 P.2d 1102 (1997). Enhancements not supported by sufficient evidence must be stricken. See State v. Valdobinos, 122 Wn.2d 270, 282-84, 858 P.2d 199 (1993).

Whether someone was armed is a mixed question of law and fact. State. v. Schelin, 147 Wn.2d 562, 566, 55 P.3d 632 (2002); State v. Mills, 80 Wn. App. 231, 233, 907 P.2d 316 (1995). As a result, this Court applies de novo review to the question of whether the facts found by the trial court were "sufficient as a matter of law" to prove the defendant was armed. Schelin, 147 Wn.2d at 566; Mills, 80 Wn. App. at 234-35.

Because of the implications of the constitutional right to bear arms, the legal definition of when someone is "armed" for a firearm enhancement is very specific. See Schelin, 147 Wn.2d at 575. Under RCW 9.94A.533(3), the prosecution is required to prove 1) a

firearm was easily accessible and readily available for either offensive or defensive purposes, 2) the availability and accessibility occurred during the crime, and 3) there was a link, or "nexus," not only between the defendant and the gun but also between the gun and the crime. Valdobinos, 122 Wn.2d at 282; Schelin, 147 Wn.2d at 575; see State v. Willis, 153 Wn.2d 366, 103 P.3d 1213, 1216-17 (2005).

This Court has held that a gun is not "easily accessible and readily available" during a crime simply because the gun was in a place where illegal activity was occurring, even when that activity involves production of drugs. Valdobinos, 122 Wn.2d at 282; see Schelin, 147 Wn.2d at 575; see also, State v. Johnson, 94 Wn. App. 882, 895-96, 974 P.2d 855 (1999), review denied, 139 Wn.2d 1028 (2000). Nor is it enough that there was a gun found at a house where an ongoing drug manufacturing operation was also found, because "[s]imply constructively possessing a weapon on the premises during the entire period of illegal activity is not enough to establish a nexus between the crime and the weapons." Johnson, 94 Wn. App. at 895; see Schelin, 147 Wn.2d at 575-76 (where crime is considered "ongoing," there must be proof of something more than just that a gun was constructively possessed

by the defendant over a period of time in which drugs were allegedly made nearby. Schelin, 147 Wn.2d at 575-76.

Here, the only charged time for the commission of the crime was "on or about the 20th day of November," the date of the arrest and search. CP 105. The trial court's sparse findings on the firearm established that the police found "[i]n the defendant's garage. . .a loaded Smith and Wesson .357 handgun, a Colt .45, a Davis model P .380 firearm." CP 162-64 (Finding XV). The court also stated, as part of Finding XIX, that "[a]t the time defendant was manufacturing methamphetamine, he was armed because the guns found in the garage where [sp] readily available for offensive or defensive purposes." CP 163-65.

In his oral opinion, the judge fleshed out his ruling, finding that the guns in the locked safe were "easily accessible and readily available" to Mr. Neff because he was the person who had the key to the locked garage, and "who else would have access to the safe but Mr. Neff?" 7RP 235-236. For the gun in the rafters, although acknowledging there was nothing in the record indicating where or how that gun was placed, the judge found Neff armed with that gun because, "presumably it wouldn't be very hard to reach up and pull

it down." 7RP 235-36.[4] The judge concluded that there was "evidence" the guns were "readily accessible to" Mr. Neff, because they were located where the lab was, the access to that garage was "in his control" because he had the key, and "it isn't very hard to get them." 7RP 236.

But the mere fact that Mr. Neff had the key to the locked garage and access to the key to the safe does not support the conclusion that the guns found in that locked garage, in the rafters and in a locked safe, were "readily available and easily accessible" to him as a matter of law for the manufacturing of methamphetamine crime. Instead, there must be some proof actually linking the gun to the crime of manufacturing, more than just by mere presence and the defendant's constructive possession. Schelin, 147 Wn.2d at 575; State v. Eckenrode, 159 Wn.2d 488, 494-95, 150 P.3d 1116 (2007); see also State v. Call, 75 Wn. App. 866, 867-69, 880 P.2d 571 (1994) (where there was a

[4]The court also found, in its oral ruling, that the gun in the bedroom in the house was "easily accessible" because it was easy to reach. 7RP 235-36. The court did not rely on that gun, however, in finding Mr. Neff was armed with a firearm for the offense. CP 163-64.

marijuana grow operation found in a house and three guns also found in the bedroom, it was insufficient that the guns were in the same place as the manufacturing or could have been used in relation to the manufacturing).

Indeed, this Court has held that proof the defendant unlawfully and constructively possessed a firearm while committing another crime is insufficient. Schelin, 147 Wn.2d at 582 n. 2; Valdobinos, 122 Wn.2d at 570. While proof of constructive possession of a gun is certainly enough to support a conviction for unlawful possession of a firearm, to prove a defendant was "armed" for firearm enhancement purposes, the prosecution must show some nexus between the gun and the crime, not just proof of unlawful possession of the firearm "at some point during the commission of a crime." Schelin, 147 Wn.2d at 582 n. 2; see State v. Gurske, 155 Wn.2d 134, 138, 118 P.3d 333 (2005); State v. Staley, 123 Wn.2d 794, 798-99, 872 P.2d 502 (1994).

In upholding the enhancement in this case, the court of appeals first had to make its own factual findings, because of the absence of those findings in the record. Division Two declared that a "reasonable finder of fact" could "infer" from the evidence the "most likely explanation" of the evidence, which the court said was

that "Neff was in the garage beginning to cook methamphetamine" and was thus near the weapons when the officer arrived. Neff, supra, 2006 Wash. App. LEXIS 1429 (at 24-25).

But the finder of fact - the trial court - never made any such findings. Indeed, the record below makes it clear that the trial court did not understand the legal requirement that there had to be a link between the guns and the crime, more than mere proximity. 7RP 236-37. The trial court specifically focused only on whether the weapons could be physically reached (for the uncharged gun in the rafters) or who had the guns in their "control" by having keys to the safe (for the guns inside). CP 358-59; see 7RP 235-37. While the court said it was "very possible" Neff had the guns out and put them in the safe when he saw the officer outside, the court stopped short of making such a finding, nor did the prosecution include a finding on that point in the Findings and Conclusion it drafted. See CP 358-59; 7RP 235-37.

Gurske, supra, is on point. In Gurske, this Court vacated a deadly weapons enhancement when the defendant's truck was stopped because of a traffic infraction and a backpack with a gun and methamphetamine was found directly behind the driver's seat. 155 Wn.2d at 136. While there was evidence the backpack was

within reach, there was no evidence whether the defendant could have unzipped it, removed the torch which was on top of the gun and grabbed the gun from where he sat. 155 Wn.2d at 136-37. In addition, there was no evidence the defendant had made any motions towards the backpack when stopped, nor was there any evidence he had used a gun when acquiring the drugs found in the backpack or in other way relating to them. Id.

This Court held that the evidence was insufficient to support the firearm enhancement. Id. In so doing, the Court specifically rejected the state's invitation to "infer" that the defendant could have reached the gun from where he had sat, because there was no on that point in the stipulated facts. Id.

Just as in Gurske, here, there was no evidence that Neff could have gotten under the desk, unlocked the safe, and removed all of the items to easily reach the guns.[5] Just as in Gurske, the state is asking to have this Court "infer" the necessary facts to support the enhancement, as the court of appeals attempted to do. But unlike in Gurske, Neff was not even in proximity to the guns when arrested. Contrary to the "inferences" made by the court of

[5]In the safe was, *inter alia*, four bags of suspected marijuana and a number of miscellaneous documents. See CP 212-17.

appeals, under Gurske it cannot be assumed that Neff was in the garage and that the guns in the safe - the only guns charged - were actually readily available and easily accessible. While there was the *possibility* that the guns in the safe *could have* been used in the manufacturing crime, as this Court has declared, "a defendant's *potential* to use a firearm in connection with a criminal enterprise" is not enough to support a firearm enhancement. Schelin, 147 Wn.2d at 586 (emphasis in original). The evidence was insufficient to support the enhancement.

2. The agreement was not a valid waiver

Because there was insufficient evidence to support the firearm enhancement, this Court must address whether there was a valid waiver of the constitutional right to be free from punishment unless the prosecution proves its case with sufficient evidence. This Court should hold that the "stipulated bench trial" agreement clause waiving the right to challenge "the sufficiency of the evidence to support these convictions on appeal" did not amount to such a waiver, because the proceeding below was not a true stipulated facts trial and Neff was not properly advised of and did not properly waive his due process rights. See CP 99-105.

Both the state and federal constitutions guarantee the right to be free from punishment except upon sufficient evidence as an essential part

of due process. See Seattle v. Slack, 113 Wn.2d 850, 859, 784 P.2d 494 (1989); State v. Duran-Davila, 77 Wn. App. 701, 703, 892 P.2d 1125 (1995). This right is so important and the requirement of sufficient evidence so fundamental that the absence of such evidence may be raised for the first time on appeal and the failure of the prosecution to present such evidence compels not only reversal but reversal and dismissal with prejudice. See Slack, 113 Wn.2d at 859; State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996).

Here, the agreement did not inform Mr. Neff that he was waiving his due process rights to be free from conviction upon insufficient evidence. CP 99-104. Nor did the court do so before accepting the "stipulation" which amounted to such a waiver. 7RP 212-29. Instead, the agreement contained a stipulation that there was "sufficient evidence" to support not only a possible conviction to the charges but also that there was "sufficient evidence to support the charged offense and the firearm enhancement." CP 99, 100. And the waiver of the right to appeal on the sufficiency of the evidence referred only to waiving appeal on the evidence supporting "these *convictions*," not the firearm enhancement. CP 101 (emphasis added). In addition, during the very brief mention of the waiver of the "right to challenge sufficiency of the evidence to support the conviction on appeal" at the hearing, no one addressed Mr. Neff, or asked

if he understood that he was waiving that right and was doing so knowingly, voluntarily and intelligently. 7RP 224-25.

In upholding the enhancement, the court of appeals relied upon its belief that the enhancement was supported by sufficient evidence. Neff, 2006 Wash. App. LEXIS 1429 (at 12-25). As noted herein, it was not. But the more fundamental problem with the court of appeals decision is that it treated this case as if there was a true stipulated facts agreement when, in fact, there was not. See id.

The discussion of "stipulated facts" trial proceedings must begin with the requirements of Brookhart v. Janis, 384 U.S. 1, 16 L. Ed. 2d 314, 86 S. Ct. 1245 (1966), and their impact on this case. In Brookhart, the relevant proceeding was referred to as a "prima facie case." 384 U.S. at 3-4. In that proceeding, the defendant, while not pleading guilty, agrees not to contest the state's case or cross-examine witnesses, and also agrees that the state only need prove the elements of the crime. 384 U.S. at 3-4.

In the Supreme Court, the defendant claimed that he was not properly advised of and did not knowingly, voluntarily and intelligently waive his rights to confrontation and cross-examination of witnesses in entering the agreement, despite acknowledging his signatures on two jury trial waivers. 384 U.S. at 3-7. The trial court had specifically informed the defendant there would be no cross-examination and even told counsel

he could not "reserve" the right to cross-examine if the testimony of any witness cast doubt on his client's guilt, because a "prima facie case" involves a defendant "not technically or legally, [but] in effect" admitting his guilt but wanting the state to prove the case. 384 U.S. at 6-8. The defendant said, on the record, that he was not admitting guilt and was not pleading guilty. 384 U.S. at 6-7. When the court asked the defendant to decide if he wanted a full trial or to go forward with the "prima facie case," counsel said "they" were only interested in the "prima facie case" proceeding. 384 U.S. at 6-7.

On certiorari, the Supreme Court first noted the strong presumption against waiver of constitutional rights. 384 U.S. at 4-5. Next, the Court noted that, while it was clear that *counsel* understood the rights his client was waiving and the procedure to which his client was agreeing, it was not clear his *client* understood. 384 U.S. at 7. Instead, the Court said, "[t]he record shows. . . that petitioner himself did not intelligently and knowingly agree to be tried in a proceeding which was the equivalent of a guilty plea and in which he would not have the right to be confronted with and cross-examine the witnesses against him." 384 U.S. at 7. Because the proceeding was the "practical equivalent of pleading guilty," the Court then addressed the question of whether counsel could waive the right to trial and

effectively enter a plea for his client, concluding he could not. 384 U.S. at 8.

Some states applying Brookhart have crafted complex bodies of law dealing with what they call "slow"or "de facto" pleas, or submission for a "prima facie case," all of which occur when the defendant enters a plea of not guilty but the proceedings are "based on stipulated facts which in the circumstances is tantamount to a guilty plea." See, e.g., State v. Avila, 127 Ariz. 21, 617 P.2d 1137 (1980).

Thus far, however, Washington courts have avoided entering into the "morass" regarding such proceedings by making a clear distinction between a stipulated facts trial and a plea. State v. Johnson, 38 Wn. App. 113, 116, 684 P.2d 775 (1984), affirmed, 104 Wn.2d 338, 705 P.3d 773 (1985); see also State v. Olson, 73 Wn. App. 348, 353, 869 P.2d 110, review denied, 124 Wn.2d 1029 (1994); State v. Jacobsen, 33 Wn. App. 529, 656 P.2d 1103 (1982), review denied, 99 Wn;2d 1010 (1983); State v. Davis, 29 Wn. App. 691, 630 P.2d 938, review denied, 96 Wn.2d 1013 (1981); State v. Wiley, 26 Wn. App. 422, 613 P.2d 549, review denied, 94 Wn.2d 1014 (1980). In Johnson, this Court described a true "stipulated facts trial," which it found "functionally and

qualitatively different" to the "prima facie case" or similar proceedings to Brookhart, as follows:

> In a stipulated facts trial, the judge or jury still determines the defendant's guilt or innocence; the State must prove beyond a reasonable doubt the defendant's guilt; and the defendant is not precluded from offering evidence or cross-examining witnesses but in essence, by the stipulation, agrees that what the State presents is what the witnesses would say. *Furthermore, in a stipulated facts trial the defendant maintains his right to appeal, which is lost when a guilty plea is entered.*

104 Wn.2d 338 (emphasis added).

This Court also quoted with approval the court of appeals decision in Wiley, in which it was said:

> A guilty plea, however, is functionally and qualitatively different from a stipulation. *A guilty plea generally waives the right to appeal.* A guilty plea has been said to be "itself a conviction; nothing remains but to give judgment and determine punishment."
>
> A stipulation, on the other hand. . .is only an admission that if the State's witnesses were called, they would testify in accordance with the summary presented by the prosecutor. The trial court must make a determination of guilt or innocence. *More importantly, a stipulation preserves legal issues for appeal* and can operate to keep potentially prejudicial matters from the jury's consideration.

Johnson, 104 Wn.2d at 341, quoting, Wiley, 26 Wn. App. at 425-26

(citations omitted) (emphasis added).

Thus, the fundamental character of a stipulated facts agreement is that it is not an admission of guilt or even an admission that the evidence would prove guilt, but simply an evidentiary stipulation which leaves the conclusion of guilt to the court. See Johnson, 104 Wn.2d at 341; State v. Mierz, 127 Wn.2d 460, 469, 901 P.d 286 (1995). And the hallmark of a true stipulated facts agreement is that it preserves the issues for appeal, instead of waiving them as with a plea. Johnson, 104 Wn.2d at 341.

Indeed, Gurske, supra, involved a stipulated facts trial, and the issue of the sufficiency of the evidence for the firearm enhancement was not only raised on appeal but prevailed. 155 Wn.2d 134 at 137.

The confusing agreement in this case was not a true agreement to proceed in a stipulated facts trial. Instead, the agreement was more akin to a plea. Although it included language to the contrary, the agreement contained a stipulation that "there is sufficient evidence to support the charged offense and the firearm enhancement as charged." CP 99-104. Further, the parties and court effectively treated the agreement as if it were a plea and guilt

a foregone conclusion, scheduling a day for sentencing and talking about Neff's need to get a "rider" on his bail before the court had even received the evidence upon which it was to rule. 7RP 212-29.

Indeed, Neff himself thought that he was entering into a "plea deal" with the stipulation. 7RP 220.

More importantly, however, the agreement here did not preserve all the relevant legal issues for appeal, as occurs when there is a true stipulated facts trial under Johnson. Instead, the agreement purported to *waive* the right to appeal the most fundamental of all issues - the right to be free from conviction and punishment upon anything less than sufficient evidence.

The agreement here was much more akin to the entry of a plea than a true stipulated facts trial agreement. As a result, Mr. Neff should have been fully advised, on the record, of the important rights he was giving up, prior to the acceptance of the agreement by the court. Regardless of the title of the document, the agreement was not a true "stipulated facts trial" agreement and this Court should so hold. Because Neff was not advised by the agreement or at the hearing that he was waiving his due process rights to be free from punishment unless the prosecution provided

constitutionally sufficient proof to support it, the agreement did not amount to a valid waiver of that right and the right to appeal the insufficiency of the evidence for the firearm enhancement, and this Court should so hold.

3. Counsel was ineffective

Even if this Court does not agree that the waiver of the right to appeal the sufficiency of the evidence was invalid and no true stipulated facts trial occurred, this Court should reverse based upon counsel ineffectiveness below. Both the state and federal constitutions guarantee the right to effective assistance of counsel. Strickland v. Washington, 366 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996); Sixth Amend.; Wa. Const. Art. 1, sec. 22 (amend. 10). In the court of appeals, Mr. Neff argued that counsel was ineffective not only in having his client sign the confusing, improper "stipulated facts" agreement but also in failing to present the trial court with the relevant caselaw from this Court which would have clearly established that there was insufficient evidence to support the firearm enhancement, even though invited to do so. See BOA at 28-31. The court of appeals concluded that there was no ineffectiveness in the entry of the agreement because there was a

strategic reason to enter it. Neff, 2006 Wash. App. LEXIS 1429 (at 12-25). It also concluded there was no ineffectiveness in failing to reargue the issue of the sufficiency of the evidence for the enhancement or present caselaw on that point either at the hearing or later, because Division Two believed there *was* sufficient evidence. Id.

Division Two was simply wrong. As noted, *infra*, the evidence was insufficient to support the enhancement. Counsel's performance in relation to the enhancement must therefore be addressed. An attorney's performance is analyzed by applying an objective standard of reasonableness. State v. Studd, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999). Performance is deficient if it fell below that standard, "in consideration of all of the circumstances." Id. Further, although there is a strong presumption that appointed counsel is effective, that presumption is overwhelmingly rebutted when counsel fails to "conduct appropriate investigations, either factual or legal, to determine what matters of defense were available." State v. Jury, 19 Wn. App. 256, 264, 576 P.2d 1392, review denied, 90 Wn.2d 1006 (1978).

Here, counsel did just that, in failing to present the court with the relevant, binding authority on the issue of the insufficiency of

the proof for the firearm enhancement. As noted above, there are many, many cases establishing that the evidence here - merely constructive possession in the same place as where the manufacturing occurred - was entirely insufficient to prove that Mr. Neff was "armed" for the manufacturing count as a matter of law. And those same cases would have supported the very arguments counsel had already made about the fact that the guns were found in the safe or not proven to be accessible. Yet counsel first failed to present these cases in his arguments to the court on the stipulated facts trial after knowing in advance what the state's evidence would be. Then he failed to investigate and present these cases *when specifically told he could do so after the judge declared that he did not know the relevant law on the issue.*

There can be no tactical reason for counsel to have failed to reargue. The court had already ruled against Neff. There was no possible harm in taking the court up on its invitation to reargue, after having marshaled the relevant, binding caselaw. Any thin "tactical" claim which could possibly be contrived for this situation would not fall within even the "wide range of professionally competent assistance" within which tactical decisions are protected. In re Davis, 152 Wn.2d 647, 714, 101 P.3d 1 (2004)

(where a "tactical" decision is outside that wide range, it may support a claim of ineffective assistance).

It is true there may be a tactical reason to allow a client to sign an agreement which waives important rights. But there can be no legitimate tactical reason for counsel's failure to reargue here, or to make sure that your client is aware of the important rights he is waiving. Further, there can be no legitimate tactical reason to allow your client to potentially lose the right to appeal the very argument you are going to present to the court, without a clear understanding of the due process implications of such a waiver. Where a defendant is deprived of an appeal because of ineffective assistance of counsel, he is deprived of not only his right to counsel but of his due process rights, as well. State v. Frampton, 45 Wn. App. 554, 558 n. 3, 726 P.2d 486 (1986).

There can be no question that counsel's ineffectiveness prejudiced Neff. The law on the firearm enhancement is overwhelmingly in his favor, and the court was willing to reconsider. Had counsel done even a cursory investigation of the law and presented even a small portion of it to the court, there is more than a substantial likelihood that the unsupported firearm enhancement would not have been imposed. And had counsel effectively

handled the stipulation agreement, it would have been clear to his client what he was actually waiving. This Court should reverse.

D. CONCLUSION

For the reasons stated in the pleadings, this Court should reverse.

DATED this _____ day of _____, 2007.

Respectfully submitted,

_____

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TO E-MAIL

CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Brief to opposing counsel and petitioner by depositing the same in the United States Mail, first class postage pre-paid, as follows:

To: Kathleen Proctor, Pierce County Prosecutor's Office, 946 County City Building, 930 Tacoma Ave. S., Tacoma, WA. 98402;

To: Mr. Roy L. Neff, DOC 780428, Airway Heights Correction Center, P.O. Box 1809, Airway Heights, WA. 99001.

DATED this _____ day of _____, 2007.

Kathryn Russell Selk, No. 23879
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APPENDIX A:

The verbatim report of proceedings in this case consists of 14 volumes, which will be referred to as follows:

the proceedings of February 26, 2003, as "1RP;"
May 1, 2003, as "2RP;"
August 17, 2003, as "3RP;"
September 3, 2003, as "4RP;"
November 12, 2003, as "5RP;"
November 19, 2003, as "6RP;"
the three chronologically paginated proceedings of November 20, 24 and 25, 2003, as "7RP;"
the separate volume entitled "reporter's supplemental transcript of proceedings," of November 24 and 25, 2003, as "8RP;"
sentencing on October 1, 2004, as "SRP;"
March 7, 2005, as "9RP;"
January 1, 2006, as "10RP."